

I have said that an injunction obtained ex parte can, for good reason, be discharged ex parte. On that ground alone, I could have discharged the injunction. However, I also had serious reservations as to whether full and frank disclosure was made by the plaintiffs when they obtained the injunction.

Special duties arise when an application for an ex parte interim injunction is made. Where an ex parte application is made, the plaintiff is obliged not only not to mislead the court but in addition, he is under a duty to disclose to the court all matters which are within his knowledge which are material to the proceedings and which are or may be in favour of an absent party. A matter is regarded as material if it is a factor that the court will take into account in the exercise of its discretion.

I have examined the authorities on the duty of full and frank disclosure in *Tunas (Pte) Ltd v Mayer Investment Pte Ltd*<sup>5</sup> and will only make brief reference to them here. As Issacs J in *Thomas A Edison Ltd v Bullock*<sup>6</sup> said:

Ubberima fides is required, and the party inducing the court to act in the absence of the other party fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which the party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fail.

A very material fact that was suppressed was the petition to wind up the plaintiffs which was served on the plaintiffs before the ex parte application was made. The fact that the plaintiffs had only a paid-up capital of \$2 was also not disclosed. Further, no mention was made of the letter from the defendant's solicitors to the plaintiffs' solicitors, whereby the purported contract between the parties was terminated.

In reply, the plaintiffs said that their clients were lay people who were not aware of the winding-up petition when they gave instructions for the preparation of the affidavit. It has been held that the failure to inform the court of a material fact is not excused merely because the party seeking interlocutory relief has forgotten its existence. The authority is *Clifton v Robinson*.<sup>7</sup> It has also been held in *Daglish v Jarvie*<sup>8</sup> that a plaintiff is not necessarily excused because he believed that particular matters known to him are not material.

Hence, if on an ex parte application, the plaintiff does not make full and sufficient disclosure, his application will, in the absence of special circumstances, be dismissed. This is a rule based on public policy. It is designed to prevent abuse of the procedure of court by a person who has a special advantage in view of the absence of the other party.

The court should deal with great strictness and severity with persons who apply for ex parte injunctions. A

A party applying is bound to put the court in possession of all the facts in order to enable it to judge whether the defendant ought to be put to what may be described as a very serious sanction, ie a temporary injunction.

It was in the light of these reasons that I felt that a sufficient case of cogency had been made out for discharge. In any event, on the strength of the defendant's facts and argument, I was of the opinion that there was no full and frank disclosure of material facts. In the circumstances, I discharged the interim injunction.

*Application allowed.*

C Solicitors: *David See & Co; Arthur Loke & Partners.*

Reported by *Terence Tan Bian Chye*

## D Tay Theng Khoon & Anor v Lee Kim Tah (Pte) Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS  
NO 347 OF 1988  
THEAN J  
27 MARCH 1989

E *Land Law — Agreement for sale and purchase of land — Requisitions — Unsatisfactory replies to requisitions — Property possibly affected by road widening — Situation of property such that prudent purchaser would realize that property would be so affected — Property required to be re-zoned for development — Subject to development charge*

F *Words and Phrases — 'Proposal' — Singapore Law Society's Conditions of Sale, cl 7*

The plaintiffs contracted to sell two lots of freehold property to the defendants subject to the Law Society's Conditions of Sale. The defendants subsequently informed the plaintiffs that replies from the Public Works Department ('PWD') and the Development and Building Control Division ('DBCD') were unsatisfactory and reserved their right to withdraw from the purchase of the property. The defendants claimed that the road interpretation plan indicated that the property would be affected by road widening. The DBCD had also replied that the property was subject to public open space zoning and would have to be re-zoned for development. The defendants contended that these replies were unsatisfactory, which gave them a right to withdraw from the purchase under cl 7 of the agreement. The defendants also claimed that since there was a development charge for residential development, in effect there was a denial of planning permission for the development of the property for residential purposes and that they were therefore entitled to withdraw from the purchase under cl 8 of the agreement. The plaintiffs sued for performance of the agreement.

I **Held**, dismissing the plaintiffs' claims:

(1) The test of unsatisfactoriness of a reply to government requisitions was objective and not subjective, given the wording of the relevant clause in the agreement.

(2) The siting of the property in relation to existing roads would make it clear to a reasonably prudent purchaser that the

property would be affected by some road widening. In deciding, therefore, if the road interpretation plan was unsatisfactory, this road widening was to be entirely discounted.

(3) The layout plan, submitted together with a development application by a previous potential purchaser of the property, had incorporated a proposed road widening to the exact same extent as the road interpretation plan. Since this application had been taken over by the defendant, the defendant had knowledge of the road widening and the reply from the PWD could not therefore be considered unsatisfactory.

(4) The events antecedent to the agreement could not be looked at in construing the agreement. However, the agreement should be construed against the factual matrix of the background at the time the contract was made.

(5) The DBCD reply, looked at objectively, was plainly unsatisfactory, but this alone did not entitle the defendants to withdraw from the purchase of the property as the right to withdraw was subject to provisos, of which only the second was relevant. This allowed the defendants to withdraw from the purchase should the reply disclose that the property was adversely affected by 'any drainage or other proposal of the government'.

(6) The DBCD reply disclosed public open zoning on the property, and such zoning inhibited or adversely affected the development of the property for residential purposes. The reply therefore disclosed that the property was adversely affected by a 'proposal of government'. The defendants were therefore entitled to withdraw from the purchase under cl 7 of the agreement.

(7) Based on the decision on the zoning issue, the claims of the plaintiffs were dismissed and the defendant was entitled to withdraw from the purchase of the property. The deposit paid by the defendant to the plaintiff's solicitors had been placed in an interest-bearing account in the joint names of the plaintiffs' and the defendants' solicitors. Since the defendants did not succeed on all the issues, the defendants would only be entitled to half their costs from the plaintiffs.

[*Obiter dicta*: The approval in principle given by DBCD was also subject to six conditions and the payment of a development charge of over \$180,000. The payment of this amount was clearly an onerous condition, particularly having regard to the purchase price of the property. However, such an onerous condition did not in any way prevent the approval in principle from being an approval, as it was not so burdensome as to prevent it from being a permission in the real sense of the word. The defendants were therefore not entitled to withdraw from the purchase under cl 8 of the agreement.]

[*Editorial Note*: The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No 29 of 1989.]

#### Cases referred to

- 1 *Peh Kwee Yong v Sinar Co Pte Ltd* [1987] 2 MLJ 533 (distd)
- 2 *Richard West & Partners (Inverness) Ltd & Anor v Dick* [1969] 2 Ch 424 (folld)
- 3 *Layman Pty Ltd v Murray* [1973] 2 NSWLR 863 (distd)

*Loo Choon Chiaw and Loo Choon Hiaw* for the plaintiffs.  
*Kan Ting Chiu* for the defendants.

*Cur Adv Vult*

**Thean J:** The plaintiffs were at the material time the proprietors of a freehold property which consists of two

A contiguous lots of land marked on the government resurvey map as lots 414-63 and 414-64 of mukim XVII ('the property'). Lot 414-63 has an area of approximately 1,505.2sq m on which there is, or was at that time, a house known as No 24, Lorong Biawak, Singapore, and lot 414-64 is a narrow strip of land fronting the road and has an area of 84.4sq m.

B On 23 December 1987, by a document headed 'Option' and addressed to one Tan Sim Guan (or nominee) the plaintiffs offered to sell the property at the price of \$858,706 on terms and conditions therein set forth. A sum of \$9,000 was paid to the plaintiffs as consideration for the offer, and  
C by its express terms the offer was kept open for acceptance till 4pm on 13 January 1988 and was to be accepted by the offeree signing that portion thereof headed 'Acceptance Copy' and delivering it together with 10% of the purchase price (less the sum of \$9,000) to the solicitors for the plaintiffs. It was clearly intended by the plaintiffs that the  
D benefit of the offer was assignable and that the offer was available for acceptance by an assignee of Tan Sim Guan ('Tan'). On 13 January 1988, prior to the time of expiry of the offer, the defendants, as the assignees of Tan, accepted the offer in accordance with the terms thereof. Thus, a valid and binding agreement ('the agreement') for the sale  
E and purchase of the property was made between the plaintiffs and the defendants on that date.

The agreement on the face of it appears to be simple and straightforward and is not a lengthy document; it incorporates 'The Singapore Law Society's Conditions of Sale'. However, there are three material terms thereof  
F which unfortunately have led to the present litigation between the parties, and they are cl 5, 7 and 8 and are as follows:

G 5 The sale price shall be Singapore Dollars eight hundred and fifty-eight thousand seven hundred and six only (\$858,706). The purchaser shall not be entitled to any abatement of the sale price on account of any road-line, road reserve or other road proposal touching or affecting the property.

H 7 Subject to cl 5 hereof, the property is sold subject to the purchaser receiving satisfactory replies to all requisitions from the relevant competent authorities including that of the traffic manager Mass Rapid Transit Corporation. If any such reply shall be unsatisfactory the purchaser shall have the right so long as they produce evidence thereof to the vendor to withdraw from the purchase in which case the vendor shall refund to the purchaser the deposit paid hereunder free of interest and thereupon this agreement shall absolutely cease and determine and be null and void and of no effect and neither party hereto shall have any claim whatsoever against the other provided always that no such reply shall be construed to be unsatisfactory if the property is affected by any notice under any statute which is capable of being complied with by and at the expense of the vendor so long as such notice shall have been served in respect of the property prior to the date of completion hereof nor shall the purchaser be entitled to withdraw from the purchase if the reply discloses that the property is not adversely affected by any drainage or other proposal of government and provided further that if no notice  
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hereunder is received by the vendor from the purchaser within eight (8) weeks from the date hereof the purchaser shall be deemed to have received satisfactory replies and the purchaser shall not be entitled to withdraw from the purchase.

8 Notwithstanding anything herein, the purchaser shall be entitled to withdraw from this purchase if the government shall deny planning permission for the development of the property for residential purposes.

Prior to the issue of the offer there had been negotiations between the plaintiffs and one Clement Low who at the time was interested in purchasing the property. While the negotiations were in progress an application for the development of the property was submitted to the Development and Building Control Division ('DBCD') of the Public Works Department, Ministry of National Development. That application was made in the names of the plaintiffs as the owners and of Clement Low as the prospective purchaser, and the layout plan for the proposed development was drawn by Clement Low's architects, Messrs James Yip & Partners, who actually submitted the application to the DBCD. The proposed development was the construction on lot 414-63 of three units of two-storey terrace houses fronting Lorong Biawak and one unit of two-storey detached house at the rear. Subsequently, negotiations between the plaintiffs and Clement Low became abortive, and neither of them took any steps to withdraw the application. Hence, at the date when the agreement was made, that application was still pending before the DBCD. Following the making of the agreement and pursuant to a discussion with the solicitors for the defendants, the solicitors for the plaintiffs on 2 February 1988 informed DBCD of the sale of the property to the defendants and confirmed that the plaintiffs had no objection to the defendants submitting to DBCD their plans for development. However, on 5 February 1988, the solicitors for the plaintiffs wrote to the solicitors for the defendants stating, *inter alia*, the following with reference to the pending application:

We have today been contacted by a Miss Heng of the Development and Building Control Division, with regard to the (property). Apparently, the previous intending purchaser of the property had put in a set of plans for planning approval, prior to the expiry of the option. The option was eventually not executed and the sale was aborted. We have been informally advised that it may be quicker to await the outcome on that first application for planning permission, and if in principle approval is given, to subsequently put in your clients' final plans, rather than to now put in your clients' initial plans, as much time will be wasted in the Development and Building Control Division having to consider in-principle approval from scratch.

In response, the defendants' solicitors, by their letter of 13 February 1988, agreed that the application should be proceeded with and sought an extension of time for completion of the purchase, as it was apprehended that approval of the application might not be forthcoming within

A the time fixed for completion. The defendants in effect, by that letter of their solicitors, agreed to accept that application which was then pending before DBCD. On the same day of 13 February the solicitors for the plaintiffs wrote again to the solicitors for the defendants informing them that they had learnt from DBCD that 'in-principle planning permission for the development of the property for residential purposes' had been given and suggested that the defendants might wish to proceed with the lodgement of final plans for development. The approval in principle, in fact, was given by DBCD on 15 February 1988 as evidenced by their letter of that date written to Messrs James Yip & Partners. The approval, however, is subject to six conditions, one of which is as follows:

Re-zoning of the portion of the site within public open space to residential zone together with payment of the requisite development charge.

On the same day of 15 February 1988, the defendants' solicitors wrote to the plaintiffs' solicitors stating that they (the defendants' solicitors) had received:

- (i) from the Public Works Department, a road interpretation plan showing that the property, ie the whole of lot 414-64 and a part of lot 414-63, would be affected by road improvement; and
- (ii) from DBCD a reply to their requisition showing that part of the property was zoned public open space and therefore not available (for development) for residential purposes.

These replies to the requisitions, they said, were unsatisfactory, and on behalf of the defendants they invoked cl 7 of the agreement and gave notice that the defendants reserved their right to withdraw from the purchase. Subsequently, by a letter dated 4 March 1988 written to the plaintiffs' solicitors, they confirmed the defendants' withdrawal from the purchase of the property.

Soon thereafter, negotiations presumably took place between the plaintiffs and the defendants with the view to resolving the differences, but unfortunately they were unsuccessful. In consequence, the plaintiffs took out this originating summons claiming various reliefs against the defendants and the claim is resisted by the defendants. At the hearing before me the defendants raised a further defence to the claim. They invoked cl 8 of the agreement and maintained that they were entitled to withdraw from the purchase of the property on the ground that the government had refused planning permission for development of the property for residential purposes. There are, therefore, two main issues before me, namely:

- (i) whether by reason of the road interpretation plan and/or the reply from DBCD on zoning, the defendants were entitled under cl 7 of the agreement to withdraw from the purchase of the property; and
- (ii) whether there has been a denial or refusal by the government of planning permission for development

of the property for residential purposes so as to entitle the defendants under cl 8 of the agreement to withdraw from the purchase.

In connection with the first issue, it is not in dispute that the road interpretation plan and the reply from DBCD are replies to requisitions from competent authorities within the meaning of cl 7. It is also not in dispute that in view of the wording in cl 7, ie 'If any such reply shall be unsatisfactory the purchaser shall have the right ...', as distinguished from a slightly different wording of a similar clause in *Peh Kwee Yong v Sinar Company (Pte) Ltd*,<sup>1</sup> the test of unsatisfactoriness of a reply in question is an objective one and not, as in *Peh Kwee Yong*,<sup>1</sup> dependent on the subjective judgment of the purchaser. That being so, two questions arise, namely: (i) whether the road interpretation plan and the reply from DBCD are in each case unsatisfactory; and (ii) if both or either of them is unsatisfactory, whether the defendants were entitled by reason thereof under cl 7 to withdraw from the purchase of the property. I shall consider separately each of these replies to the requisitions.

The road interpretation plan shows that a portion of the property in the shape of a hammer-head cul-de-sac is required for road improvement, namely, the widening of Lorong Biawak, and this portion covers (i) the whole of lot 414-64, and (ii) a very narrow strip of lot 414-63 immediately adjoining to lot 414-64 ending with a hammer-head at the north-west corner. The total area of lot 414-63 affected is approximately 67.4sq m and in relation to the whole of the area of lot 414-63 is slightly less than 4.5%. The defendants sought to show that the whole of the portion affected has an area of 151.8sq m of the entire property (comprising lots 414-63 and 414-64) and that the area affected is 9.5% of the entire area of the property. Such a computation is technically correct but in practical terms is an exaggeration. It ignores the fact that lot 414-63 constitutes substantially the whole of the property, and lot 414-64 is a subsidiary lot which is a narrow strip of land immediately fronting the road, Lorong Biawak. This narrow strip protrudes on to Lorong Biawak, and it must be plain to any reasonably prudent purchaser and, in particular, it must have been plain to the defendants, who are developers, that this narrow strip of land at any rate has been earmarked and would be required for widening of Lorong Biawak. I therefore adopt a realistic approach, and in considering whether the road interpretation plan is, in terms of area, unsatisfactory, I discount entirely its affection on lot 414-64.

I now turn to cl 7 of the agreement. It is by no means a simple provision; it has been drafted in a very involved fashion. It is expressed at the outset to be subject to cl 5, and at the end thereof there are three provisos which limit the operation of that clause with the result that the effect of the clause (from a purchaser's point of view) is consid-

erably curtailed. At this stage, it is necessary to examine cl 5 and the extent to which it impinges on cl 7. Counsel for the plaintiffs sought to construe cll 5 and 7 by referring to and relying on events antecedent to the making of the agreement. Evidence of such events is of no assistance and the agreement cannot be construed by reference to these events. I have therefore disregarded all matters pertaining to negotiations between the plaintiffs and Tan which led to the issue of the offer by the plaintiffs. I construe the provisions only against 'the factual matrix of the background' at the time the agreement was made.

Clause 5 is in two parts: it first stipulates the price of the property, and secondly, provides that that price shall not be abated 'on account of any road-line, road-reserve or other road proposal touching or affecting the property'. The effect of the second part of this clause is that price-wise any road-line, road-reserve or other road proposal touching or affecting the property is immaterial or irrelevant. It seems to me plain that in view of this part of cl 5 and the respective positions of lots 414-63 and 414-64 and also their respective areas, the parties to the agreement must have contemplated the existence of a scheme or proposal for road widening affecting a portion of the property fronting the road, and had therefore agreed to disregard such a factor so far as the price of the property is concerned. At the time of the agreement, the plaintiffs certainly knew of the part of the property earmarked for road widening or road improvement; it is not unlikely that the defendants, who are developers, were unaware of it, though they denied any knowledge of it.

The next question is whether such a factor is material in other respects, eg in relation to the proposed development of the property contemplated by the defendants. This is particularly pertinent. The defendants are developers and, on the basis of cl 8 to which I shall advert shortly, one can reasonably gather that the defendants were purchasing the property for development for residential purposes. Such an inference is reinforced by the fact that on 13 February 1988, they agreed through their solicitors that the application for planning permission for development of three two-storey terrace houses and one two-storey detached house then pending before DBCD should be proceeded with. It is significant that the layout plan submitted to DBCD in connection with the application, of which they must be taken to have some knowledge, has incorporated therein a proposed widening of Lorong Biawak precisely to the same extent as set out in the road interpretation plan. Therefore, the road improvement or road widening as envisaged in the road interpretation plan will not in any way impede the proposed development of the property contemplated by the defendants; they had the development in contemplation, if not at the time of the making of the agreement, certainly at the time when they agreed to the application being proceeded with, ie on 13 February 1988.

For all these reasons, I am clearly of the opinion that the road interpretation plan cannot in the circumstances be considered as unsatisfactory, and the defendants were not entitled by reason thereof to withdraw from the purchase of the property.

I now turn to the reply from DBCD dated 9 February 1988 ('DBCD reply') to the requisition submitted by the solicitors for the defendants. The reply discloses (i) that the zoning of the property was 'residential/public open space'; (ii) that an application for the proposed erection of four two-storey terrace houses was refused on 18 October 1983 on the ground that it was not the policy to allow development on lands zoned 'public open space in the master plan'; and (iii) that the applicant was advised to submit a formal application for a bungalow development on the portion of the property zoned residential in the master plan, and the layout should also take into account the provision of a hammer-head cul-de-sac. The DBCD reply, however, does not set out or describe the portions of the property zoned 'public open space' and 'residential' respectively; these particulars are found in the zone interpretation plan, which the defendants subsequently obtained from Messrs James Yip & Partners. That plan shows that a large portion of lot 414-63, in area of approximately 976.2sq m, is zoned 'public open space' and a smaller portion, triangular in shape, in area of approximately 529sq m, is zoned 'permanent residential'. In effect, nearly 65% of the entire lot 414-63 is within the 'public open space' zoning. (Here again for practical purposes I have ignored lot 414-64.) That being so, if lot 414-63 is to be developed for residential purposes as contemplated by both parties — which was evidenced by the layout plan submitted to DBCD — the area zoned 'public open space' will have to be re-zoned 'permanent residential' and on such re-zoning a development charge will have to be paid. This was fully borne out by the subsequent event, namely, the grant of approval in principle by DBCD for residential development, which was subject, inter alia, to re-zoning and payment of a development charge. In the circumstances, and looking at the DBCD reply objectively, it is plainly unsatisfactory; but that alone does not under cl 7 entitle the defendants to withdraw from the purchase of the property, because there are three provisos at the end thereof which restrict such right, and for our purpose only the second proviso is relevant.

The wording of the second proviso is couched with double negatives as follows: 'nor shall the purchaser be entitled to withdraw from the purchase if the reply discloses that the property is not adversely affected by any drainage or other proposal of government.' Stripped of the awkwardness of the phraseology, the proviso means that the purchaser is entitled to withdraw from the purchase if the reply discloses that the property is adversely affected by 'any drainage or other proposal of govern-

ment'. Drainage does not arise here and is irrelevant. The question is whether the DBCD reply (as amplified by the zone interpretation plan) discloses that the property is adversely affected by any 'proposal of government'. The DBCD reply discloses, inter alia, that the property is adversely affected by the 'public open space' zoning which inhibits future development of the property, and the question is whether what is disclosed is or amounts to a 'proposal of government', and that question turns on the true construction of the word 'proposal'.

The word 'proposal' is not a term of art and should be given its ordinary meaning and be construed in the context of cl 7. In its ordinary sense, the word means an offer, suggestion or putting forward of anything for consideration. According to *The Oxford English Dictionary*, it means also 'the action, or an act, of putting before the mind; setting forth, propounding, statement'. It seems to me that in the context of cl 7, the word 'proposal' cannot receive only a narrow meaning such as an offer or suggestion or putting forward of anything for consideration; it must be given a broader meaning, and includes any statement, plan, scheme or thing set forth or put forward. First, cl 7 deals with replies to requisitions from competent authorities and not all the replies contain a proposal in the narrow sense of an offer or suggestion. Secondly, the second proviso qualifies the right of a purchaser to withdraw from the purchase of the property in the event of a reply to the requisition being unsatisfactory — such right being given in the first part of cl 7 — and it seems to me that this proviso is intended to set a criterion for determining the unsatisfactoriness of a reply to the requisition so that for a reply to be considered as unsatisfactory it must disclose some statement, scheme, plan or thing that adversely affects the property, its use or enjoyment, present or future.

Reverting now to the DBCD reply, it is true it does not disclose any proposal in the sense of an offer or suggestion of the government, but it discloses public open space zoning on the property or part of it, at any rate, as shown subsequently on the zone interpretation plan, and such zoning inhibits or adversely affects the future use or development of the property and, particularly in this case, the development of the property for residential purposes as contemplated by the parties. For the reasons I have given, I am of the opinion that the DBCD reply discloses that the property is adversely affected by a 'proposal of government' within the meaning of the second proviso to cl 7, and in my judgment, the defendants were entitled under cl 7 to withdraw from the purchase of the property, which they did. The resolution of this issue is sufficient to dispose of these proceedings, but since full arguments on the second main issue have been addressed to me, I should proceed to consider and decide on that issue also.

This issue turns on the true construction of cl 8 of the agreement in the light of the approval in principle given by

DBCD on 15 February 1988 for development of the property for residential purposes. Clause 8 is drafted in clear terms: it gives a right to the defendants to withdraw from the purchase of the property upon fulfilment of a condition, which is couched in a negative sense, ie if the government shall deny planning permission for the development of the property for residential purposes. The question therefore is this: having regard to the approval in principle granted by DBCD, can it really be said that there has been a denial by the government of planning permission for development of the property for residential purposes within the meaning of cl 8?

The approval in principle given by DBCD is not an unconditional approval; it is an approval subject to six conditions, one of which is the re-zoning of that portion of land then zoned 'public open space' to 'permanent residential', and payment of a development charge which at that time was estimated to be about \$200,000 and which subsequently was determined by the planning authority to be \$185,359. The payment of that amount is undoubtedly an onerous condition, particularly having regard to the purchase price of the property.

I think it is fair to say that such an onerous condition was not contemplated by the parties, and certainly not by the defendants though they are developers, at the time of the making of the agreement. It was argued on behalf of the plaintiffs that such a condition was envisaged, or must have been envisaged, by the defendants and agreed to by them when they accepted on 13 February 1988 that the application previously submitted to DBCD should be proceeded with. That they had notice of the application and the layout plan submitted before they accepted or agreed that the application should go ahead is a fair and reasonable inference. It can also be fairly and reasonably inferred that from the layout plan they knew or had notice of the public open space zoning of a part of the property and consequently a proposed re-zoning of that part to residential zoning would be required. However, that layout plan did not show or disclose the extent or the area of the property zoned 'public open space'; that area so zoned (as subsequently discovered by the defendants) comprises more than half (nearly 65%) of the entire area of lot 414-63. It cannot, in the circumstances, be imputed to the defendants, notwithstanding that they are developers, the knowledge that the proposed re-zoning would involve an expenditure of \$185,359.

Nonetheless, the defendants had entered into a valid and binding contract for the purchase of the property, and their right to resile therefrom must be founded on an express term, and cl 8 provides in clear terms the condition on which they may do so with impunity; it is for them to bring themselves within that clause. There has been in fact no denial or refusal by the government of a planning permission for development of the property for residen-

cial purposes. Approval in principle for such development has been given on conditions which are capable of being fulfilled, and though one of the conditions is onerous, such an onerous condition does not in any way prevent it being an approval; nor can it be said that the approval by reason of such condition is tantamount to a denial or refusal of planning permission.

Counsel for the plaintiffs relied on *Richard West & Partners (Inverness) Ltd & Anor v Dick*,<sup>2</sup> which is of some assistance here. There, the plaintiffs agreed to sell to the defendant certain property in Scotland which the defendant intended to convert into a hotel. One of the conditions of sale, condition 15, provided that the sale was conditional 'upon planning consent being granted by the local authority following upon the application already lodged for use of the [property] as a hotel', and if such consent was not granted, the defendant would be entitled to resile from the contract. After the contract was made the local authority granted 'conditional consent' for the proposed change of use and there were two conditions attached, which were: (i) that before any alterations commenced, approval of the authority should be obtained; and (ii) that the private access road of the property to the trunk road be improved together with the provision of an adequate visibility splay at certain point to the satisfaction of the authority's surveyor. It was argued on behalf of the purchaser that the planning consent in the condition of the sale meant an unconditional consent and not one subject to a condition which entailed expenditure by the purchaser, and, accordingly, condition 15 had not been complied with, and the purchaser was entitled to resile from the contract. That argument was rejected by Megarry J who said, at p 433:

Plainly the document is not a refusal of permission. Equally plainly it gives some sort of consent or permission. ... I do not see how a conditional consent could be said not to be a consent at all. If, then, it is a consent, any requirement that it must not merely be a consent, but also be a consent of a particular nature or quality (namely, unconditional and not conditional) must, in my judgment, be sufficiently stated or indicated by the contract. I cannot see any ground here for treating the words 'planning consent' as meaning 'unconditional planning consent,' and even less for treating them as bearing the differential meaning of 'unconditional planning consent except for any conditions which do not require expenditure'. If the conditions annexed to a planning permission are so burdensome as to prevent it being a permission in any real sense of the word, then the result might well be otherwise. But that, very properly, has not been contended here, and in any event there is no evidence to support it.

On appeal, the decision of Megarry J was affirmed. Harman LJ said at p 435:

I am far from saying that in some circumstances a so-called 'conditional consent' might not amount in effect to a refusal. But in the present case the only condition of consent was about a sign and all that was involved was that the purchaser should provide 'an adequate visibility splay' and a 'no entry'

sign. Having done that, he would have satisfied the local authority and there was nothing more for him to do; it did not involve him in any considerable expense at all. But the purchaser's real grievance is a quite different one. He finds that the fire authorities have insisted or are insisting on some very considerable and rather onerous restrictions — not restrictions so much as a provision of hoses and fire-proof doors and what not — which may, I doubt not, involve a good deal of expense on the purchaser. ... They are imposed by an entirely different authority, namely, the fire authority, and are no part of the town planning scheme in itself.

In this case, as I have said, the requirement of re-zoning and payment of the development charge in the sum of \$185,359 is an onerous condition, but, in my view, it cannot be maintained that it is 'so burdensome as to prevent [the approval in principle] being a permission in any real sense of the word'.

Counsel for the defendants sought to distinguish *Richard West*<sup>2</sup> and relied on *Layman Pty Ltd v Murray*<sup>3</sup> where a contract for the sale of certain land was expressly subject to the condition that the vendor undertook: (i) to obtain registration with the authority concerned of a plan of sub-division of the land into two blocks, one lot being the land sold and the other lot being the land retained, and (ii) to obtain approval in principle from the local council to the subdivision of the land sold with at least eight residential blocks, and if either registration or approval should not be obtained the purchaser should have the right to rescind the contract. The local council granted approval for the sub-division subject to certain conditions, one of which was the requirement of a strip of land 11m wide and 72m long (in area 792sq m) between the land sold and that retained be dedicated as public reserve, which in effect would be taken out of the land which the parties had contemplated would be retained by the vendors. The vendors refused to agree to the suggested dedication for the purpose of obtaining the approval. The learned judge found that the sub-division approval by the council was different from that contemplated by the parties and that the dedication of the strip of land did not fall within the obligation under the contract to do things reasonable and proper to obtain an approval of the proposed sub-division. He said, at p 868:

I do think that a contract which, in the terms of it, envisages that there will be a planned sub-division into two blocks, such as is referred to in special condition (1)(i), with a further sub-division into eight blocks as referred to in special condition (1)(ii), would involve by implication the dedication, not merely of a de minimis area of land but of an area of such a size as that required by the council as part of the relevant sub-division approval. I do not think that this can be properly described as something to be done in order to obtain the consent to the sub-division which was in this contract in contemplation by the parties. It would in fact be in my view a different sub-division from that which the parties contemplated.

Referring to the dedication of the strip of land, he said, at p 869:

A In addition, I have grave doubts whether, even if there can be said to be the obligation upon the defendant to do all things reasonable and proper to obtain an approval to the proposed sub-division (and assuming that the proposed sub-division will include within the meaning of that term a sub-division where a strip of land was dedicated to the council in the manner here in question) the dedication of an area of land of the size and value of this particular area [can fall within that obligation]. The evidence before me is by no means clear as to what the precise value of this land is.

B He then dealt with the evidence bearing on the costs of the land involved, and expressed his view thus:

C Prima facie, in my view, as far as I am able to assess reasonableness upon the evidence that is before me, I do not think that the dedication of an area of such a cost would be within an obligation to do things reasonable and proper of the kind to which I have referred.

The case before me is clearly not on all fours with the *Layman* case.<sup>3</sup> On the true construction of cl 8, the defendants' right to resile from the agreement only arises if the government shall deny or refuse approval for development of the property for residential purposes. There has been no such denial or refusal; on the contrary, on the material before me, approval in principle has been granted for development of the property for residential purposes.

E That development so approved was contemplated by both the plaintiffs and the defendants. Assuming that the defendants did not contemplate such development at the time the agreement was made, they accepted the proposed development on 13 February 1988. The thing that they did not contemplate, however, was the expenditure of the sum of \$185,359 as development charge payable on re-zoning. That incidence of liability flowing from the approval given by DBCD they must accept. The defendants were not entitled under this clause to withdraw from the purchase of the property.

G In view of my decision that the defendants were entitled by reason of the DBCD reply to withdraw from the purchase of the property under cl 7 of the agreement, the claim of the plaintiffs fails and is dismissed. As for the deposit of \$85,870.60 paid to the solicitors of the plaintiffs, I understand that that amount, since the commencement of these proceedings, has been placed in an interest bearing account in the joint names of the plaintiffs' and the defendants' solicitors. I therefore order that the amount plus interest accrued be paid to the defendants. On the question of costs, the defendants did not succeed in all the issues, and should not be entitled to the full costs. Accordingly, I order that the plaintiffs pay to the defendants half the costs of these proceedings.

I *Plaintiffs' claims dismissed.*

Solicitors: *Loo & Partners; Low Yeap & Co.*

Reported by *Terence Tan Bian Chye*